[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLOYD LANDIS, **Plaintiff-Appellant,** **v.** **TAILWIND SPORTS CORP., JOHAN BRUYNEEL,** **Defendants-Appellees,** **UNITED STATES OF AMERICA,** **Plaintiff-Appellee.**	**No. 18-7143**

UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO DISMISS

As part of a settlement agreement executed on November 20, 2018 between Floyd Landis and the United States, Landis—the only appellant in this case—agreed to dismiss this appeal from a final judgment in a False Claims Act action. In the settlement agreement, the United States agreed to consent to this dismissal, which it did by an email sent later that day. Both the settlement and the emailed consent were effectuated by duly authorized attorneys from the Civil Division of the Department of Justice (DOJ). Landis does not dispute that his settlement with DOJ is a binding agreement, but he argues that the email from DOJ sent on the same day is a nullity.

Landis bases this theory entirely on his contention that the President's designation of Matthew Whitaker as the Acting Attorney General under the Federal Vacancies Reform Act on November 7, 2018 was "invalid and unconstitutional." Motion at 2.

Landis's attempt to transform his motion to dismiss his appeal into a freestanding challenge to the designation of an Acting Attorney General fails at every level. The President's designation of an Acting Attorney General is entirely consistent with the Constitution and relevant statutes. *See* Designating an Acting Attorney General, 42 Op. O.L.C. __, at 1 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download; Memorandum for Respondents in Opposition to Petitioner's Motion to Substitute, No. 18-496 (S. Ct.) (filed Nov. 26, 2018); Order, *United States v. Valencia*, No. 5:17-CR-882 (W.D. Tex. Nov. 27, 2018) (Dkt. No. 175) (holding that the designation is authorized by the FVRA and does not violate the Appointments Clause), *appeal docketed* No. 18-51008 (5th Cir. Dec. 3. 2008). But the United States' settlement agreement with Landis provides no occasion for this Court to address a legal challenge to that designation.

Regardless of whether the False Claims Act required the United States to consent to the dismissal of a relator's appeal, Landis is wrong to suggest that the United States' settlement agreement gives him the right to challenge that consent. Landis identifies no theory on which the United States' settlement agreement could be binding while the United States' email consenting to dismissal on the same day is not. And in any event, the identity of the Acting Attorney General is entirely irrelevant to

the United States' conduct of this litigation, which took place under the supervision of the Senate-confirmed officer to whom responsibility for this case has been delegated by longstanding regulation, as permitted by statute. Accordingly, this Court should grant Landis's motion to dismiss this appeal without addressing the validity of Mr. Whitaker's designation.

STATEMENT

Landis brought a qui tam action alleging that Lance Armstrong and other defendants violated the False Claims Act (FCA) in connection with contracts entered into by the U.S. Postal Service. Dkt. No. 2. The United States intervened with respect to Armstrong and the other defendants that remain part of this case, ultimately settling with Armstrong. Dkt. No. 592. The district court entered a default judgment against the remaining defendants, Johan Bruyneel and Tailwind Sports Corporation, awarding the United States $369,000 in civil penalties under the False Claims Act against both defendants and approximately $1.3 million in connection with the United States' unjust enrichment claim against Bruyneel alone. Dkt. Nos. 602, 603, 605. The district court denied Landis's motion—which the United States did not join—for False Claims Act damages against the defendants. Dkt. No. 604.

On September 21, 2018, Landis appealed, indicating that he intended to challenge the district court's failure to award FCA damages on the default judgment against the remaining defendants. Dkt. No. 607; Statement of Issues (filed Oct. 29, 2018). On November 20, 2018, Landis and the United States entered into a

settlement agreement. *See* Motion, Exhibit 1. The United States agreed to give Landis a share of any monies recovered on the unjust enrichment award, and Landis agreed to "file with the U.S. Court of Appeals for the District of Columbia the papers necessary to secure dismissal of his appeal, within 5 (five) days of the execution of this Agreement." Motion, Exhibit 1 at 2-3. The United States also agreed to "provide to Relator its written consent to dismissal of the appeal, within 5 (five) days of the execution of this Agreement." *Id.* at 3. The agreement was signed by an attorney from DOJ's Civil Division and an Assistant U.S. Attorney from the U.S. Attorney's Office for the District of Columbia. *Id.* at 5. Later that day, in conformity with the agreement, the counsel of record for the United States in this appeal—also an attorney from DOJ's Civil Division—sent an email indicating that the United States consented to Landis's withdrawal of this appeal. Motion, Exhibit 2.

ARGUMENT

This Court Should Grant Appellant's Request To Dismiss This Appeal.

Landis suggests that his motion to withdraw this appeal requires this Court's consideration of the validity of the President's designation of an Acting Attorney General under the Federal Vacancies Reform Act. *See* Motion at 1-2. But that designation is not at issue here. Accordingly, the Court should grant appellant's motion to dismiss this appeal without considering the designation issue.

A. The Settlement Agreement Gives Landis No Basis To Challenge The Acting Attorney General's Designation.

The settlement agreement between Landis and the United States provides no grounds for Landis's extraordinary request to declare the Acting Attorney General's designation invalid. Even if Landis were correct that there were some sort of defect in this designation, that defect would not operate to invalidate those DOJ actions Landis wishes to challenge, while leaving intact those Landis would like to preserve. Landis articulates no theory on which the government's consent to the settlement agreement is enforceable while the government's consent to the dismissal of this appeal, made pursuant to the settlement agreement on the same day, is a nullity.

B. The Identity of the Acting Attorney General Is Irrelevant To The United States' Conduct Of This Litigation.

In any event, the identity of the Acting Attorney General is entirely irrelevant to this litigation. There is a fundamental disconnect between the actions of the Department of Justice in this proceeding that Landis seeks to challenge, and Landis's attack on the Acting Attorney General's designation. Landis makes no allegation that the Acting Attorney General was personally involved in this case.[1] And he makes no

[1] Although an Attorney General may of course choose to involve himself in particular cases handled by the Department, *see* 28 U.S.C. § 516 (litigation involving the United States and federal agencies and officers is reserved for officers of the Department of Justice under the Attorney General's direction), he is under no obligation to do so. And given the thousands of cases handled by the Department's litigating divisions and the offices of 93 U.S. Attorneys each year, it is not feasible for an Attorney General to participate personally in more than a relative handful of the Department's cases.

attempt to explain how the authority of the relevant DOJ attorneys to act for the United States in this proceeding depends in any way on his challenge to the validity of the Acting Attorney General's designation. Nor could he; the alleged invalidity of that designation has no bearing on the government's conduct in this proceeding or its authority to proceed.

First, although almost all of the functions of the Department of Justice and its officers—including its litigation functions under 28 U.S.C. § 515(a)—are vested in the Attorney General, 28 U.S.C. § 509, the Attorney General need not and in most cases does not exercise those functions himself. The Attorney General's litigation authority has long been delegated by regulation to various other Senate-confirmed Department officials, as expressly permitted by 28 U.S.C. § 510. In particular, "[e]ach Assistant Attorney General and Deputy Assistant Attorney General is authorized to exercise the litigation authority of the Attorney General under 28 U.S.C. 515(a) in cases assigned to, conducted, handled, or supervised by such official." 28 C.F.R. § 0.13(a). Here, the DOJ attorneys assigned to this case were supervised by the Assistant Attorney General for the Civil Division, who has been confirmed by the Senate, and is specifically authorized by regulation to litigate False Claims Act cases on behalf of the United States. *See* 28 C.F.R. § 0.45(d).

Such delegations remain valid and binding until revoked or amended by the Attorney General. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (reaffirming the principle that "[s]o long as [a] regulation" delegating certain powers of the

Attorney General to subordinate officials "is extant[,] it has the force of law," even if the Attorney General could reassert his authority by "amend[ing] or revok[ing] the regulation" defining the subordinate's authority); *Champaign County v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) (declining to consider whether agency had "a properly appointed Administrator" because the decision being challenged was made by an Assistant Administrator exercising previously delegated authority and "a delegation of authority survives the resignation of the person who issued the delegation"); *United States v. Morton Salt Co.*, 216 F. Supp. 250, 256 (D. Minn. 1962) ("[W]hen a designated official acts within the scope of his authority, the authorization must continue until it is revoked or is otherwise terminated. If this were not true, a change of administration or resignation from office by the official who acted within his authority when the designation was made would create a chaotic condition in the administration of the affairs of the Department of Justice."), *aff'd*, 382 U.S. 44 (1965). Thus, even when there is a new occupant in the office of the Attorney General, these delegations remain in force, providing other officers with standing authority to carry out the Department's litigation functions. Indeed, even if the office of the Attorney General were vacant and there were no Acting Attorney General, these delegations would remain valid and permit the Department's litigation work to continue without interruption. They are therefore valid *a fortiori* here, where it is undisputed that one of the Department's

current officials has the authority to serve as Acting Attorney General, and Landis is merely disputing which individual that is.

Because the Department's Assistant Attorneys General and the divisions that they head have express delegations of legal authority to conduct litigation on behalf of the United States and its agencies, the authority of the Civil Division to conduct this proceeding does not depend on whether the Acting Attorney General has been validly assigned to his position by the President. Since no authorization by the Attorney General or Acting Attorney General is required for the Civil Division to proceed with this litigation, whether the Acting Attorney General has been validly designated, and hence whether he could provide lawful authorization for the conduct of the litigation, is simply irrelevant.

Moreover, the Assistant Attorney General is in turn already ultimately supervised by the very Senate-confirmed Deputy Attorney General who Landis alleges should be serving as the Acting Attorney General. The Deputy Attorney General is "authorized to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally." 28 C.F.R. § 0.15(a). The Deputy Attorney General therefore enjoys the same supervisory authority over litigation by the Department as the Attorney General himself. To the extent that Landis asserts that the Deputy Attorney General should be supervising the Department officials conducting this litigation, that is already the case. Where litigation is conducted by a Senate-confirmed Assistant

Attorney General and his subordinates pursuant to longstanding delegations of the Attorney General's authority, and where the litigation is ultimately supervised by the Senate-confirmed Deputy Attorney General, the validity of the Acting Attorney General's designation is irrelevant to the proper supervision of the litigating officials' actions, at least absent an adequate showing that the Acting Attorney General personally affected the litigation's supervision.[2]

For similar reasons, Landis lacks standing to challenge the lawfulness of Mr. Whitaker's designation as Acting Attorney General. Landis has no injury; the government is not preventing Landis from dismissing this appeal. Landis instead seeks to raise "a generally available grievance about government," and such grievances do "not state an Article III case or controversy." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)); *see, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (noting that Article III requires a plaintiff to demonstrate a "particularized" injury, meaning one that "affect[s] the plaintiff in a personal and individual way") (citation omitted). Article III forecloses considering Landis's generalized complaint about Mr. Whitaker's designation.

[2] This case thus differs from instances in which a party challenges the appointment of an officer who is required by law to participate in the action harming the party. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (explaining that a party need not demonstrate a "direct causal link between" an alleged Appointments Clause error and the challenged officer's "adverse decision"). As discussed above, the law makes clear that the Acting Attorney General need *not* participate in the litigation actions challenged here.

CONCLUSION

For the foregoing reasons, this Court should decline to address Landis's challenge to the Acting Attorney General's designation and grant Landis's motion to dismiss this appeal.

Respectfully submitted,

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DECEMBER 2018

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(d)

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,206 words according to the count of Microsoft Word.

/s/ Melissa N. Patterson
Melissa N. Patterson

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 6, 2018, I electronically served and filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I also hereby certify that the parties to the case are represented by a registered CM/ECF user and will be served via the CM/ECF system, except Tailwind Sports Corporation. On October 31, 2018, Blair Brown notified this Court that he had withdrawn as counsel for Tailwind Sports Corporation in the district court, and requested that this Court remove his name from the docket. No counsel or contact information is listed on this Court's docket for this entity.

/s/ Melissa N. Patterson
Melissa N. Patterson